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No. 95-1167

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

UNITED STATES OF AMERICA, *ex rel.*
MURRAY W. LINDENTHAL; DONALD WILLIS

Petitioners,

v.

GENERAL DYNAMICS CORPORATION

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

General Dynamics takes issue with the questions presented in the petition, which merely summarize petitioner's arguments. General Dynamics believes the questions to be as follows:

1. Is an award of "costs" under Fed.R.Civ.P. 54(d) to the prevailing defendant in a *qui tam* action brought under the civil False Claims Act, 31 U.S.C. §§ 3729 *et seq.*, precluded by 31 U.S.C. § 3730(d)(4), which provides for an award of attorneys' fees and expenses if the action is proved to be "clearly frivolous?"

2. Did the courts below err in concluding that General Dynamics did not submit any false claims to the government?

PARTIES TO THE PROCEEDING

The petition did not identify the parties to the proceeding. The parties are pro se petitioner Donald B. Willis (hereafter referred to as "Mr. Willis") and respondent General Dynamics Corporation ("General Dynamics"). It appears that Murray W. Lindenthal, a co-plaintiff in the action below, is not a party to this proceeding.

For purposes of further clarification, General Dynamics notes that this action was brought under the so-called *"qui tam"* provisions of the civil False Claims Act (31 U.S.C. § 3730), which enable a private citizen (often referred to as a "relator") to bring a false claims action on behalf of the federal government. The United States, which is identified in the case caption, has a right of intervention in all *qui tam* actions. In this action, "[t]he relators prosecuted the action on their own after the Government declined to intervene." Petition Appendix A-2 (Ninth Circuit Opinion). Pursuant to the government's request -- and as reflected on the proof of service -- the parties serve copies of all filed papers upon the government, even though the government is not a party to the proceeding.

CORPORATE DISCLOSURE STATEMENT

Respondent General Dynamics Corporation has no parent company, subsidiaries or affiliates which have issued shares to the public.

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STATUTORY PROVISIONS

(*Not already noted in the petition*)

The Civil False Claims Act, 31 U.S.C. §§ 3729 *et seq.*

§ 3729. False Claims

(a) Liability for certain acts. Any person who --

(1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval . . .

is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person . . . .

(b) Knowing and knowingly defined. -- For purposes of this section, the terms "knowing" and "knowingly" mean that a person, with respect to information --

(1) has actual knowledge of the information;

(2) acts in deliberate ignorance of the truth or falsity of the information; or

(3) acts in reckless disregard of the truth or falsity of the information,

and no specific intent to defraud is required.

STATEMENT OF THE CASE

Petitioner Willis, along with his co-plaintiff, Mr. Lindenthal, brought this *qui tam* action alleging that General Dynamics defrauded the government under the civil False Claims Act, 31 U.S.C. §§ 3729 *et seq.*1/ Mr. Willis' claims arose from General Dynamics' submission of a technical data package to the Air Force which Mr. Willis believes was non-compliant with General Dynamics' contractual requirements. The courts below found that Mr. Willis' claims were unsupported, and in any event amounted merely to a condemnation of General Dynamics' performance -- an allegation which is not actionable under the False Claims Act which requires proof that a defendant knowingly submitted to the government that which it knew to be a false or fraudulent claim for payment. The court also awarded costs to General Dynamics under Fed.R.Civ.P. 54(d). Mr. Willis, without presenting any authority in support of his views, nor any conflict in the law, now requests that the Court grant certiorari to consider reversing those decisions.

At issue was a contract between the Air Force and General Dynamics for the development and production of eight mobile, ground-based radar systems called MUTES (Multiple Threat Emitter Systems), a highly complex set of electronic components that are used to train Air Force pilots by simulating and emitting signals to pilots which duplicate those of an enemy attack. The contract also called for delivery to the Air Force of a technical data package reflecting the MUTES design. Some, but not all of the MUTES components were to be depicted in the technical

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1/ The history, background and legislative purpose behind the *qui tam* provisions of the False Claims Act are summarized in *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co.*, 944 F.2d 1149 (3d Cir. 1991).

data package by engineering drawings prepared in accordance with a military specification called "Level 3" which would enable the Air Force to use those drawings later on to buy additional components through competitive bidding.2/

During the course of General Dynamics' performance, the Air Force reviewed, audited and evaluated the technical data package, including the Level 3 drawings to determine whether it was satisfactory. Deficiencies, i.e., drawing errors and areas of inadequate descriptive detail, were noted by the Air Force and corrected by General Dynamics to the satisfaction of the Air Force which accepted the technical data package. Petition Appendix B-5 to B-8.

The Air Force later used the General Dynamics' technical data package to purchase spare component parts from General Dynamics and other contractors through competitive bidding. The Air Force also used the technical data package as the basis for a competition for a contract to build fourteen additional MUTES systems. That contract was won by Aydin Corporation, for whom Mr. Willis was employed as an engineer. Aydin's contract required it to rely exclusively upon the technical data package the Air Force

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2/ Level 3 is described in a military specification called MIL-D-1000A which states in pertinent part that Level 3 drawings "shall provide engineering definition sufficiently complete to enable a competent manufacturer to produce . . . item(s) . . . interchangeable with those of the original design . . . without resorting to additional product design effort . . . ." The specification further states that Level 3 drawings shall: "reflect the end product . . . provide the engineering data for the support of quantity production . . . [and] provide the necessary data to permit competitive procurement . . . of items substantially identical to the original item(s) . . . ." *See* district court's paraphrasing of this specification at Petition Appendix B-4.

received from General Dynamics. This is referred to as a "build-to-print" contract, which requires the contractor to build the product precisely according to the technical data package supplied by the government, and requires the government to pay additional sums every time the contractor has to change a drawing because of an error or omission. Petition Appendix A-4.

According to Mr. Willis, Aydin encountered difficulty in manufacturing the MUTES because the technical data package lacked sufficient information to manufacture all of the components, and some of the drawings contained errors. The Air Force agreed to increase the price of Aydin's contract in exchange for converting the contract from requiring Aydin to "build-to-print" to one which obligated Aydin to produce MUTES that satisfied the Air Force's performance requirements. This is referred to as a "performance specification" contract which obligates the contractor to produce a system, for the contract price, that meets the performance requirements of the contract, regardless of whether the technical data package -- which is supplied merely as a guide -- is accurate and complete. Petition Appendix A-4.

Mr. Willis filed this action alleging that the amount of money which the Air Force paid to Aydin in accordance with converting Aydin's contract to a performance specification contract constituted damages incurred by the United States as a direct result of General Dynamics providing a deficient technical data package to the Air Force. Mr. Willis, who was not a party to the contracts between General Dynamics and the Air Force, nor involved in any way in those contracts, alleged (and restates in his petition) that General Dynamics was required to provide a technical data package that would be sufficient for another contractor to build *entire* MUTES systems under a build-to-print contract. Since the technical data package ultimately was not used in that manner, but was instead used first by the Air Force to buy spare parts and then as a guide to assist Aydin in building entire MUTES systems under a performance specification contract, Mr. Willis

asserted that General Dynamics must have defrauded the government.

In essence, Mr. Willis would hold General Dynamics liable under the False Claims Act -- which imposes liability (in the form of treble damages and penalties) on one who "knowingly presents, or causes to be presented . . . a false or fraudulent claim for payment" (31 U.S.C. § 3729(a)(1)) -- solely on the theory of deficient performance under a government contract. Mr. Willis views the primary issue of this case as one of contract interpretation. According to Mr. Willis, since General Dynamics' technical data package did not meet Mr. Willis' own interpretation of General Dynamics' contract requirements, the submission of the technical data package was a per se violation of the False Claims Act.

The courts below disagreed with Mr. Willis' factual assertions about General Dynamics' contract requirements and its performance, finding: (a) General Dynamics' technical data package, including the Level 3 drawings, met the Air Force's expectations despite the presence of a small number of minor errors, (b) the technical data package was never intended to be used for building entire MUTES systems on a build-to-print contract (in part because the contract did not require Level 3 drawings for the entire MUTES system), and (c) General Dynamics did not knowingly or recklessly submit any false information to the government in connection with the technical data package or in connection with anything else. Accordingly, the courts found that the technical data package was not the basis of any "false claims" (Petition Appendix A-8). In support of that finding, the courts relied upon the Air Force's own acknowledgment that it originally intended the Aydin contract to be a performance specification contract, not a build-to-print contract, and that the decision to convert it back to a performance specification contract was not caused by any act or omission of General Dynamics. Petition Appendix B-19.

The courts also disagreed with Mr. Willis' legal theory, holding, as a matter of law:

> Allegations or evidence which amount merely to a condemnation of a government contractor's performance of its contracts, including engineering efforts performed under those contracts, does not rise to the level of fraud or liability under the False Claims Act.

Petition Appendix B-22 (*citing Wang ex rel. United States v. FMC Corporation*, 975 F.2d 1412, 1420 (9th Cir. 1992).

In his petition, Mr. Willis asserts that the courts erred in not adopting his interpretation of General Dynamics' contract requirements. He disagrees with the finding that General Dynamics met the government's expectations, maintaining it was based on Air Force testimony of "questionable admissibility." Furthermore, Mr. Willis continues to ignore the elements of proof required to establish liability under the False Claims Act. His petition -- like his case at trial -- is devoid of any evidence that General Dynamics violated the False Claims Act. As discussed below, Mr. Willis' factual and legal assertions are unsupported, and his petition presents no grounds for reviewing the case on the merits.

Following the district court's entry of judgment in favor of General Dynamics (Petition Appendix B), General Dynamics submitted a bill of costs totaling $246,321.00, consisting of standard categories of recoverable costs, including clerk fees, service and subpoena costs, court reporter/transcript costs, witness fees, exhibit copying costs, and costs incident to the numerous discovery and trial depositions which occurred. Relators presented line-item objections, and the court, after examining in detail the categories and amounts claimed, ordered an award of costs under Fed.R.Civ.P. 54(d) in the amount of $50,271.27. Petition Appendix A-10.

Mr. Willis does not question the sufficiency of proof with regard to the costs; nor does he contest the categories of costs or the particular amount of the award. Rather, he asserts, without any supporting authority, that costs under Rule 54(d) are expressly precluded by the False Claims Act's provision for "attorneys' fees and expenses" (31 U.S.C. § 3730(d)(4)), and that General Dynamics, therefore, was not entitled to recover any of its costs.[3/]

The petition presents no conflicting authorities on either question presented; therefore, there is no basis for granting a writ of certiorari.

REASONS FOR DENYING THE PETITION

For convenience, the two questions are presented below in the same order in which they were presented in the petition.

I.

THE AWARD OF COSTS UNDER RULE 54(d)(1) WAS PROPER

Petitioner Willis contests General Dynamics' entitlement to costs under Rule 54(d)(1), which provides that costs are allowed as of course to the prevailing party "[e]xcept when express provision therefor is made . . . in a statute . . . ." He asserts that section 3730(d)(4) of the False Claims Act -- which provides for an award of "attorneys' fees and expenses" to a defendant if the qui tam relator's claim is proved to be frivolous -- is an express provision that

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3/ Mr. Willis' petition drops the argument, raised with and rejected by the Ninth Circuit, that even if the district court had authority to award costs, it abused its discretion in doing so. Petition Appendix A-14.

displaces the authority the court would otherwise have under Rule 54(d). Since the district court did not find the action to be frivolous, and therefore, did not award General Dynamics its attorneys' fees and expenses (Petition Appendix B-24), Mr. Willis asserts that the court had no authority under Rule 54(d) to award costs.

While on its face, section 3730(d)(4) provides expressly for attorneys' fees and expenses and does not contain any provision regarding "costs," Mr. Willis suggests that the term "expenses" used in section 3730(d)(4) is the same as the term "costs" used in Rule 54(d). Accordingly, Mr. Willis believes that a prevailing defendant in a qui tam action is entitled to recover its costs only if it defendant proves the relator's action to be frivolous.

As the Ninth Circuit opinion correctly held:

> . . . we reject this argument because under the FCA, fees, expenses, and costs are three distinct categories. 'Costs,' under the FCA, is not a subset of 'expenses.'

Petition Appendix A-12.

Mr. Willis' petition repeats the unsupported arguments made below, first pointing to cases in which courts used the term "costs" in a way which appeared to Mr. Willis to be interchangeable with the term "expenses." Petition, p. 9. However, as the Ninth Circuit noted, none of those cases raised any issue whatsoever regarding the award of costs. Therefore, those decisions simply do not support Mr. Willis' view. Petition Appendix A-13. He further claims that "all prior district courts have denied such costs to prevailing defendants," but he does not cite any such decision. Accordingly, there is not a single conflicting decision upon which to base the petition for certiorari.

Mr. Willis further contends that since Congress, in amending the False Claims Act in 1986, intended to

encourage more relators to bring qui tam actions, they did not intend to penalize relators with liability for defendants' costs, except where their action was frivolous.4/ Again, there is no citation to any legislative history to support that view.

In fact, there is nothing either in the express language or in the underlying intent of the False Claims Act, that precludes a prevailing defendant from recovering Rule 54(d) costs against a relator. Congress has passed "express provisions" denying successful litigants recovery of costs. *See, e.g.*, 15 U.S.C. § 77v(a) (Securities Act) ("No costs shall be assessed . . ."); 15 U.S.C § 78 (Securities Exchange Act); 15 U.S.C. § 79 (Public Utility Holding Company Act), and 28 U.S.C. § 2465. But in each instance, Congress has used the precise term "costs" when crafting the limitation on Rule 54. In enacting the 1986 amendments to the False Claims Act, Congress undoubtedly would have specifically crafted the Act to limit a prevailing defendant's entitlement to costs if that had been their objective.

Mr. Willis' efforts to convey an "interrelationship of the terms fees, expenses and costs" based on his review of

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4/ Mr. Willis suggests that the award of costs is an unjust penalty, given the court's finding that his action was not clearly frivolous. That perspective is misplaced. Denial of costs to a prevailing party -- even in a case brought in good faith and closely litigated -- is an abuse of discretion unless the unsuccessful party proves that prevailing party is guilty of some fault, misconduct, or default worthy of punishment. *See, National Information Services, Inc. v. TRW, Inc.*, 51 F.3d 1470, 1472 (9th Cir. 1995) (denial of costs is a penalty against the prevailing party). *Smith v. Southeastern Penn. Transp. Auth.*, 47 F.3d 97, 99-100 (3d Cir. 1995) (*per curiam*); *Serna v. Manzano*, 616 F.2d 1165, 1167 (10th Cir. 1980). Accordingly, the award of costs is not so much a penalty against Mr. Willis, as the denial of costs would be characterized as a penalty against General Dynamics.

"hundreds of authorities and literature" (Petition, p. 11) is without legal support.[5/] The clear distinction between "costs" and "expenses" was articulated by the district court:

> Costs and expenses are not synonymous, as costs generally include only those amounts paid for items specified in 28 U.S.C. § 1920.[6/] *Hairline Creations, Inc. v. Kefalas*, 664 F.2d 652, 655-56 (7th Cir. 1981). . . . Expenses not properly taxable as "costs" are considered "expenses." *Dickerson v. Pritchard*, 551 F. Supp. 306, 312 (W.D. Ark. 1982) (cited by plaintiff[s]). Therefore, a court may deny certain expenses while granting others as costs. A motion for costs under 28 U.S.C. § 1920 is

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5/ Mr. Willis also asserts that when he commenced this action, he did not intend to risk liability for defendant's costs, asserting that he could not possibly have been aware of potential liability for costs under Rule 54(d), which he characterizes as "some obscure undesignated rule." Petition, p. 9. Notwithstanding the irrelevance of Mr. Willis' intent, General Dynamics notes that Mr. Willis was represented by counsel from the time of commencing his action through the award of costs.

6/ 28 U.S.C. § 1920 states that a judge or clerk of any court of the United States may tax as costs the following: fees of the clerk or marshal; fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case; fees and disbursements for printing and witnesses; fees for exemplification and copies of papers necessarily obtained for use in the case; and docket fees. These are the categories of costs recovered by General Dynamics. They are far more narrow and distinct from the "expenses" which were incurred and which would have been awarded under section 3730(d)(4) had the court found the action to be frivolous.

> governed by Rule 54(d). *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 441-42 (1987).

Petition Appendix D-2 to D-3.

Furthermore, as the Ninth Circuit opinion noted, the distinction between expenses and costs is evident in the False Claims Act itself.

> Section 3730(d)(2), for instance, establishes that when a relator proceeds on his own behalf and *prevails*, he shall receive "an amount for reasonable expenses which the court finds to have been necessarily incurred, *plus* reasonable attorneys' fees and costs." 31 U.S.C. § 3730(d)(2). Similarly, section 3730(g) provides that when the government intervenes but does not prevail, 28 U.S.C. § 2412(d) shall apply. Section 2412(d), as does section 3730(d)(2), distinguishes between fees, expenses, and costs. *See* 28 U.S.C. § 2412(d)(1)(A) ("a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs"). The language of these two sections strongly suggests that costs, under the FCA, constitute a category distinct from expenses: as a matter of logic, a court could not award costs *in addition* to expenses if costs were merely a subset of expenses.

Petition Appendix A-12 (emphasis in opinion). Since the False Claims Act distinguishes between expenses and costs, the Ninth Circuit correctly held that it would be "incongruous to conclude that section 3730(d)(4), which refers only to 'fees' and 'expenses' constitutes an express provision regarding 'costs,' despite that it is silent regarding 'costs.'" Petition Appendix A-13.

The statutes and rules cited above make it clear that an award of costs under Rule 54(d) is distinct from an award of attorneys' fees and expenses under section 3730(d)(4) of the False Claims Act. Petitioner Willis lacks support for his contention that such costs are expressly precluded by the False Claims Act. Accordingly, his arguments are without merit and present no legal conflict upon which to grant a writ of certiorari.

II.

GENERAL DYNAMICS DID NOT VIOLATE THE FALSE CLAIMS ACT

A. Mr. Willis' Claim Merely Condemns General Dynamics' Performance Under Its Contracts Which Is Not Actionable Under the False Claims Act

The False Claims Act is not a remedy for challenging a contractor's performance under a government contract. Performance issues are matters of contract administration which are left to the sole discretion of the government, and are not within the purview of the False Claims Act. To prove liability a plaintiff must prove that a defendant knowingly submitted a false or fraudulent claim for payment or made false statements knowing them to be false, thereby cheating the government. *United States ex rel. Hagood v. Sonoma County Water Agency*, 929 F.2d 1416, 1421 (9th Cir. 1991). Indeed, the civil False Claims Act has been referred to as a fraud statute that is "quasi-criminal" in nature. *See, e.g., United States ex rel. Weinberger v. Equifax, Inc.*, 557 F.2d 456, 460 (5th Cir. 1977), *cert. denied*, 434 U.S. 1033 (1978); *United States v. Halper*, 490 U.S. 435, 449-50 (1989) (applying double jeopardy analysis to penalty provision).

The False Claims Act defines the "knowing" submission of a false claim as "actual knowledge," "deliberate ignorance," or "reckless disregard" of the falsity

of the information, definitions which uniformly require a showing of much more than mere negligence. 31 U.S.C. § 3729(b).7/ Courts have further defined the standard of liability under the False Claims Act. "The requisite intent is the knowing presentation of what is known to be false . . . . Innocent mistake is a defense to the criminal charge or civil complaint. So is mere negligence." *Hagood, supra,* 929 F.2d at 1421.

Applying this standard, courts have held, as did the district court in this action (Petition Appendix B-22), that allegations or evidence which amount merely to a condemnation of a government contractor's performance of its contracts, including engineering efforts performed under those contracts, do not rise to the level of fraud or liability under the False Claims Act.

In *Wang ex. rel. United States v. FMC Corp.*, 975 F.2d 1412, 1420 (9th Cir. 1992), the court found that False Claims Act liability could not be established when allegations amounted to nothing more than criticisms of defendant's engineering efforts. There, the *qui tam* plaintiff alleged that defendant's engineers made faulty calculations, lacked engineering insight and produced a defectively designed product. *Id.* at 1420-21. The court, taking the allegations as true, held that the alleged conduct might constitute a mistake or even negligence, but found that there was no evidence that

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7/ The district court also relied upon the correct definition of "deliberate ignorance" and "reckless disregard." *See* Petition Appendix B-21 to B-22, *citing United States v. Mapelli*, 971 F.2d 284, 286 (9th Cir. 1993) ("deliberate ignorance" means purposely contriving to avoid learning true facts or "willful blindness"), and *Hollinger v. Title Capital Corp.*, 914 F.2d 1564, 1570 (9th Cir. 1990) ("reckless disregard" means conduct that represents an extreme departure from the standards of ordinary care to the extent that the defendant must have been aware of it).

defendant showed deliberate ignorance of false claims for payment based on its contract performance: "Proof of ones mistakes or inabilities is not evidence that one is a cheat" and "bad math is no fraud." *Id.*

Mr. Willis' allegations amount merely to criticisms of General Dynamics' drawing preparation and engineering efforts. Thus, even if he had proved that General Dynamics' technical data package was non-compliant with its contract -- which, as discussed below, he did not prove -- he offered the courts below no evidence which could have given rise to liability under any of the standards set forth in the False Claims Act. As discussed below, his petition is similarly devoid of such evidence.

B. Mr. Willis Presented No Credible Evidence To Support Either His Interpretation of General Dynamics' Contract Requirements Or His Claims Of Deficient Performance

Notwithstanding that Mr. Willis' underlying premise of deficient performance does not rise to the level of fraud or liability required under the False Claims Act, that premise is itself unsupported. The courts below found that no false claims had been made and that General Dynamics' performance was squarely within the Air Force's contract requirements and expectations. Nothing in Mr. Willis' petition casts doubt on that holding.

First, Mr. Willis asserts that the Level 3 specification unambiguously required the submission of drawings adequate for building MUTES systems on a build-to-print contract. (And, according to Mr. Willis, since the technical data package was not put to that use, General Dynamics must have defrauded the government.) Yet the Ninth Circuit, quoting the pertinent language from the specification, correctly held that it does not contain the words "build-to-print." "Nowhere does MIL-D-1000A state that Level 3 drawings must be . . . adequate to support a 'build-to-print' contract." Petition Appendix A-7. Thus, while Mr. Willis

asserts on the one hand that the specification is unambiguous and not subject to interpretation, the meaning he attributes to the specification is not found on its face; rather it is a product of his (erroneous) interpretation.8/

In addition, Mr. Willis' interpretation is not supported anywhere else in the record.9/ He fails to cite any testimony or evidence which supports his view. His general references to one witness, Col. Schuster, and a so-called "interpretation

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8/ Mr. Willis cites a finding of fact from a decision by the Armed Services Board of Contract Appeals for the proposition that "Level 3" means "build-to-print." Petition, p. 12 (*citing General Atronics Corporation*, ASBCA No. 37923, 91-3 BCA ¶ 24, 047 (1991)). There, the Board made a determination based on the facts in that case, including the intended use for the drawings that General Atronics was to provide, and did not suggest that all Level 3 drawing packages must be capable of being used on a build-to-print basis. As noted *infra*, the Air Force witnesses in the instant case testified that Level 3 drawings have different requirements depending on how the drawings are to be used.

9/ In fact, the Air Force witnesses testified that the Level 3 specification is by nature ambiguous. Joseph Giangrosso, the Air Force Program Manager for the MUTES program, testified, "the military specification for Level 3 does not tell the contractor or the Air Force everything that needs to go into the drawings. It leaves a lot to be interpreted." Similarly, Col. Thomas Devenny, head of the Air Force division which oversaw the MUTES program, testified that a Level 3 requirement only "sets a framework or spectrum. . . . [t]here is a wide range of alternative points within the system." In addition, Dr. John Arnold, the former chief civilian in Air Force Range Systems (the office responsible for the MUTES program), testified that MIL-D-1000A does not specifically tell a contractor every piece of information that is required for the drawing; rather, it only gives the contractor a feeling of the breadth of information required.

agreement" are not supported with citations or quotations because the record does not reflect Mr. Willis' assertions.

The record reflects the overwhelming evidence presented by General Dynamics and the Air Force, as to the meaning of their contract, including the Level 3 specification. First, the contract required Level 3 drawings for only General Dynamics-built equipment and not for components bought from vendors. Petition B-5. Mr. Willis never disputed that contract provision. Thus, even if Mr. Willis were correct that Level 3 means "build-to-print," he ignores the fact that not all of the drawings were required to be Level 3, and therefore, the technical data package as a whole could not possibly have been a "build-to-print" package.

Next, the Air Force witnesses testified that the technical data package was intended to be used by the Air Force to buy spare parts through competitive bidding, and not for buying entire MUTES systems on a build-to-print basis. Petition Appendix A-9; B-4 to B-5.10/ Mr. Willis himself quotes Air Force personnel who oversaw the MUTES program as saying that the technical data package was not intended for building MUTES systems on a build-to-print basis, but he fails to rebut that testimony. Petition, pp.

10/ The court relied upon the testimony from Col. Devenny, who stated that while MIL-D-1000A defines Level 3 as permitting "competitive procurement, data for competitive reprocurement is different from data for a build to print contract." Similarly, Mr. Giangrosso testified that drawings adequate to support a "competitive procurement" are not necessarily adequate for a competitive build to print procurement. Earl Anderson, chief of the Air Force's reprocurement team responsible for buying the additional MUTES from Aydin, testified that "[h]aving a Level 3 package and doing an acquisition build to print absolutely does not mean the same thing."

14-15. Instead of rebutting testimony with citations to the record, Mr. Willis merely labels testimony that he disagrees with as "inadmissible," "questionable," and "orchestrated," thereby requesting the Court to review the credibility and admissibility of their testimony. Petition, p. 14.

Further, the evidence established that the completeness and accuracy required for a Level 3 drawing is tailored through negotiation and drawing review to fit the needs of a particular procurement. Petition Appendix B-4. The district court summarized that process, describing how General Dynamics and the Air Force worked together on the project:

> Both prior to and after the award of the . . . Contract, General Dynamics and the Air Force met regularly and frequently, attempting to reach agreement as to the scope and specific kind of information that was required to be placed on the General Dynamics Level 3 drawings.
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> * * *
>
> The Air Force regularly monitored and inspected all aspects of General Dynamics' performance . . . including . . . the preparation of the Level 3 drawings.
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> * * *
>
> The intent of the Air Force's in-process drawing reviews was to drive major errors from the drawings. What is considered a major error depends on how the drawings are going to be used. In the case of the MUTES drawings, major errors are those errors which would prohibit a competent contractor from reprocuring spares.
>
> * * *

> [T]he Air Force conducted a series of Physical Configuration Audits in which General Dynamics participated. The Physical Configuration Audits constituted the formal examination and comparison of the MUTES hardware with the Level 3 engineering drawings.
>
> * * *
>
> During the final Physical Configuration Audit, the Air Force audit team discovered discrepancies between General Dynamics' drawings and the hardware. The Air Force considered some of these discrepancies to be minor in nature, and other discrepancies were noted and disclosed to General Dynamics on individual discrepancy sheets.
>
> * * *
>
> [D]espite the presence of some errors in the drawings sampled by the Air Force, the Air Force determined that all of the drawings, whether or not specifically reviewed during the audit, satisfied General Dynamics' obligation under the . . . contract.

Petition Appendix B-4 to B-7.

Neither Mr. Willis' appellate brief nor his petition attempts to refute the court's recitation of those events which show that General Dynamics could not possibly have cheated the government under those circumstances. The level of government scrutiny of a contractor's performance has been considered as a factor in negating claims of fraudulent conduct by the contractor. In *United States ex rel. Butler v. Hughes Helicopter Company*, 71 F.3d 321 (9th Cir. 1995), another *qui tam* action, the court found:

> [T]he overwhelming evidence established a pattern of cooperation between the Army and [the defendant] during the course of a complicated, sophisticated, and highly technical military procurement program. . . . The evidence established that all information upon which [plaintiff] bases his case was not only available to the Army, but in the Army's possession.

Id. at 326 (quoting the district court's opinion). In *Wang, ex. rel. United States v. FMC Corp.*, *supra*, 975 F.2d at 1421, the court noted the government's own knowledge of defendant's engineering shortcomings, which supported the finding that defendant had performed in a manner consistent with the government's expectations.

> The government knew of FMC's mistakes and limitations, and that FMC was open with the government about them, suggests that while FMC might have been groping for solutions, it was not cheating the government in the effort. Without more, the common failings of engineers and other scientists are not culpable under the Act.

In the instant action, the district court held that "General Dynamics' drawings met the Level 3 requirements . . . [and] [t]he Air Force accepted General Dynamics' [technical data package] with full knowledge of the condition of the data contained therein . . . ." Petition Appendix B-9. While the condition of the drawings was not perfect -- as Mr. Willis insists it was required to be --

> [u]nder the contract interpretation shared by defendant and the Air Force, there was no expectation that General Dynamics' drawings would be error-free. The Air Force and General Dynamics recognized this

> impossibility and applied practical solutions aimed at driving out major or significant errors from the drawings.

Petition Appendix B-23. This finding was supported by the testimony of Col. Devenny:

> I have never bought [a Level 3 drawing package] that was without errors. These packages contain literally millions of opportunities for error and current contractor data systems cannot produce an error-free data package. . . .[I]t would be unreasonable for anyone to expect an error-free package on a complex product such as the MUTES.

In fact, of the claimed errors which Mr. Willis personally selected to demonstrate the kinds of errors that were made, about half were not in need of correction by Aydin (and therefore not subject to Mr. Willis' claimed damages); the other half, as the court found, "could fairly be characterized as minor clerical or typographical errors." Still others, Mr. Willis eventually admitted, were not caused by General Dynamics. Petition Appendix B-10. In short, they did not suggest fraud. Nor did those claimed errors or anything else suggest that General Dynamics was in any way responsible for the Air Force's decision to pay additional sums to Aydin to convert Aydin's contract to a performance specification contract.11/

11/ Regarding that decision by the Air Force, the court found that the Air Force originally had intended for Aydin to receive a performance specification contract and use General Dynamics' technical data package only as a guide. All of the testifying officials involved in the award of Aydin's contract and Aydin's performance (except for the contracting officer) testified that the

(Footnote cont'd on next page)

In contrast, the evidence showed that the Air Force received from General Dynamics precisely what it sought, and that the technical data package was of a very high quality which the Air Force has used successfully. As Joseph Giangrosso, Air Force Program Manager for the MUTES program, testified, "the Air Force was satisfied that the drawings were meeting the Level 3 standards" and "[b]ased on my experience with various drawing packages, I believe that GD's drawing package was as good as any other Level 3 drawing packages that I have worked with in the past."

In sum, despite Mr. Willis' personal and unsupported assumptions about what General Dynamics was required to provide -- an error free package suitable for building entire MUTES systems on a build-to-print basis -- General Dynamics provided that which the Air Force required. Thus, even if Mr. Willis could state a cause of action under the False Claims Act stemming from deficient contract performance, there is no support in the record for any such finding.

(Footnote cont'd from previous page.)

contracting officer made a mistake in awarding the Aydin contract as a build-to-print contract. Thus, the additional sums paid to Aydin were the result of the Air Force's mistake and had nothing to do with General Dynamics. Petition Appendix B-15, B-19.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

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